In the

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1957

No. 63

BARNEY FRIEDMAN and SARAH FRIEDMAN, husband and wife, d b a City Metal Salvage Company,
Petitioners,

VERSUS

LEROY HILL,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

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July, 1958.

UTTERBACK TYPESETTING CO 13 SO WALKER OKLAHOMA CITY PH FO 5 8750

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No. .....

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VERSUS

LEROY HILL,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF OKLAHOMA

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners, Barney Friedman and Sarah Friedman, husband and wife, pray that a Writ of Certiorari issue to review the judgment of the Supreme Court of the State of Oklahoma entered by said court on January 21, 1958.

THE OPINION BELOW

The Journal Entry of Judgment of the District Court of Oklahoma County is hereto attached as Appendix "A" and the Opinion of the Supreme Court of the State of Oklahoma is hereto attached as Appendix "B."

JURISDICTION

The decision and judgment of the Supreme Court was entered on January 21, 1958, a timely Petition for Rehearing was filed and was denied by the court below on April 15, 1958, Application to File Second Petition for Rehearing was timely filed and denied on May 20, 1958. The jurisdiction of this Court is invoked under 28 U.S.C., Section 1257(3) and Rule 19 of the Rules of the Supreme Court of the United States and more particularly paragraph 1, subparagraph (a).

STATEMENT OF THE CASE

This is an action brought in the District Court of Oklahoma County, State of Oklahoma, by the respondent Hill as plaintiff against the petitioners here as defendants in the trial court, wherein the respondent alleged that he was employed by the petitioners in interstate commerce and he brought suit for overtime compensation, for liquidated damages and attorneys fees. The case was tried partially to a jury and partially to the trial court, in that after the respondent, who will hereinafter be referred to as the plaintiff, offered his evidence, the defendants, who are petitioners here and who will hereinafter be referred to as defendants, demurred to the evidence on the ground that the evidence failed to show that the plaintiff was engaged in interstate commerce or in the preparation of goods for interstate commerce, which demurrer to the evidence was overruled. Thereafter the defendants offered their evidence and a stipulation was entered into by plaintiff and defendant to submit three questions to the jury, which questions were

as to the number of hours worked per day, per week and the total number of hours worked. The question of interstate commerce was never submitted to the jury or the nature of the work done by the plaintiff. After the jury answered these questions the trial court rendered a judgment in favor of the plaintiff and against the defendants for the sum of $2,188.00 as overtime compensation, a like amount as liquidated damages and the sum of $656.00 as attorneys fees.

Thereafter a motion for new trial was filed and overruled and appeal was then taken to the Supreme Court of Oklahoma, the judgment was affirmed and petition for rehearing filed, denied, and application for leave to file second petition for rehearing was filed and denied, application filed to vacate order denying second petition for rehearing and to stay mandate, and the court stayed mandate or the execution of the judgment pending presentation of this matter to the Supreme Court of the United States. All formal orders entered by the Supreme Court of Oklahoma are attached as appendix.

The opinion of the Supreme Court of Oklahoma refuses to consider the evidence in this case for the following reasons stated in the opinion:

> "At the conclusion of the plaintiff's evidence in chief the defendants demurred and this demurrer was overruled by the court. Thereafter, the defendants proceeded to introduce evidence in their own behalf and at the conclusion of all the evidence they did not renew the previous demurrer or move the court to direct a verdict in their favor. Thus the sufficiency of the evidence to sustain the judgment has not been presented for review."

The petitioners thus show to this Court that the Supreme Court refused to review the evidence in this case, and that since this case was brought under the Fair Labor Standards Act of 1938 it was incumbent upon the plaintiff in the trial court to prove that he was engaged in interstate commerce or in the production of goods for interstate commerce in order to give the trial court jurisdiction to try the case. The evidence reflects that the plaintiff in the trial court was engaged only in a local service, that of operating public scales, and therefore, the trial court did not have jurisdiction and the Supreme Court of the State of Oklahoma has denied to these petitioners due process of law in that the Supreme Court of the State of Oklahoma has refused to consider jurisdictional facts, and in addition thereto, this case not having been tried in the regular method and manner provided by the Oklahoma Statute for trying lawsuits but merely submitted to a jury for the purpose of having the jury answer three interrogatories, it was unnecessary that the defendants in the trial court move for an instructed verdict at the close of the evidence.

The petitioners further call to the attention of the Court that the Supreme Court of Oklahoma refused to or declined to pass upon the facts in this case which were jurisdictional and which have been construed by the Supreme Court of the United States in similar cases and by the various Federal Courts holding that a failure to prove coverage under the Fair Labor Standards Act deprives a court of jurisdiction.

Petitioners further show to the Court that this case presents a very unusual proceeding completely beyond the

pale of accepted and usual course of judicial proceedings and contrary to the established law of the State of Oklahoma and contrary to the decisions of the Supreme Court of the United States and the Federal Courts construing the Fair Labor Standards Act of 1938 and the amendments thereto.

The case-made which contains a complete transcript of all proceedings had in this cause is being filed with the Clerk of this Court and by reference made a part hereof.

QUESTIONS PRESENTED

1. The trial court and the Supreme Court of Oklahoma refused or declined to consider the Federal law, namely the Fair Labor Standards Act and the amendments thereto, and the decisions of the Federal Courts construing the same, and have attempted to place the plaintiff in the trial court under said Act when the evidence, the Act itself, the amendments thereto, the opinions of this Court and the opinions of the various Federal Courts clearly show that the plaintiff in the trial court, respondent here, was not covered by the Act, and therefore, the trial court and the Supreme Court of Oklahoma were completely and wholly without jurisdiction and the judgment is therefore void.

The Trial Court Was Without Jurisdiction

The Fair Labor Standards Act of 1938 requires the employee to be engaged in interstate commerce in order to give the court jurisdiction under the Act. The plaintiff

must plead and prove that he was engaged in interstate commerce a substantial part of the time and that he does not come under the exemption provided in the Act. Unless he so pleads and proves that he was engaged in interstate commerce a substantial part of the time, then and in that event, he is not covered by the Act and the court was and is without authority to render judgment. It is vital and necessary to prove plaintiff was engaged in interstate commerce to confer jurisdiction.

We ask two questions here: What was the plaintiff doing (C-M. 30-31-32-33-34):

Q. "What did you do for Barney Friedman; what was your job?

A. Weighing those trucks and selling barrels and answering telephone calls.

Q. Where did you work, what part of the lot?

A. In the front office.

Q. In the front office?

A. Yes, sir.

Q. You said you were weighing the trucks; just what did you do when the trucks came in?

A. They weigh the front axle first then the whole truck comes on and weigh it and then pull over to the rear axles and then sometimes I let them do their own figuring; in case there is a mistake, they are the ones that did it.

Q. What do you mean by figuring, figuring up what?

A. The weight on the truck.

Q. When do those trucks usually come, what time of night?

A. Well, most of them would come in around about—up until about 9:00 or 9:30 and then some would be there, the fertilizer trucks and such as like that would be there at 10:00 and 11:00 and sometimes some would be there about 1:00 o'clock.

* * * * * * * *

Q. Do you remember the names of any of the trucks that you weighed there?

A. Gillette and Santa Fe and there was a big truck from there.

Q. What size trucks were they?

A. They had semi-trailers on them.

Q. They had semi-trailers on them?

A. Yes, sir.

Q. Now, were you also employed there as a night watchman?

A. Yes, sir.

Q. What were you supposed to watch?

A. They had a cigarette machine and a candy machine and I had to watch them. They had been broke in twice, they told me.

* * * * * * * *

Q. Did Barney Friedman or Mrs. Friedman, either one, tell you why they wanted a night watchman in the office?

A. They just told me to watch those things.

Q. To watch those vending machines in the place; is that right?

A. Yes.

* * * * * * * *

Q. What were you doing while you were there?

A. Watching those machines and things."

The above is the testimony of the plaintiff. Does this testimony show that Leroy Hill was engaged in interstate commerce? How much of his time must be in interstate commerce? The legal answer is a substantial part. He testified he weighed trucks on a public scale. This does not constitute interstate commerce. Title 29, U.S.C.A., Sec. 213(a)(2) is as follows:

> "A retail or service establishment shall mean an establishment 75 per centum of whose annual dollar volume of sales of goods or services (or of both) is not for resale and is recognized as retail sales or services in the particular industry."

In *Walling, Adm'r* v. *Jacksonville Paper Co.*, 317 U.S. 564, 63 Sup. Ct. 332, the Court said in part:

> "The Fair Labor Standards Act does not extend to business or transactions that merely affect commerce."

The Tenth Circuit in *Rucker, et al.* v. *First National Bank of Miami, Okla.*, 138 F.2d 699, said in part:

> "Whether an employee is engaged in commerce or in the production of goods for commerce within coverage of Fair Labor Standards Act depends upon CHARACTER OF EMPLOYMENT AND NOT THE NATURE OF EMPLOYER'S BUSINESS."

Quoting further:

> "The burden is upon one asserting coverage under Fair Labor Standards Act to show that employee is engaged in commerce or in the production of goods for

commerce, WITHOUT REGARD TO EMPLOYER'S BUSINESS."

Vogelpohl, et al. v. *Lane Drug Co.*, 55 F. Supp. 564, uses this language:

> "The applicability of Fair Labor Standards Act DEPENDS ON CHARACTER OF EMPLOYEE'S WORK AND NOT ON BUSINESS OF EMPLOYER, EVEN THOUGH THE TWO ARE CLOSELY RELATED."

Hill, et al. v. *Jones et al.*, 59 F. Supp. 569, uses this language:

> "Unless a SUBSTANTIAL portion of employee's activities is in interstate commerce he does not come within protection of Fair Labor Standards Act."

Quoting further:

> "The application of the Fair Labor Standards Act depends on the character of employee's activities, and some employees may be engaged in commerce while others doing different work for same employer are not."

Jax Beer Co. v. *Redfern*, 124 F.2d 172, uses this language:

> "Unless a SUBSTANTIAL portion of an employee's activities is in interstate commerce HE DOES NOT COME WITHIN THE PROTECTION OF THE ACT."

It is noted that the plaintiff Hill was operating public scales, purely a local service.

In *Fleming, Adm'r of the Wage & Hour Div. U. S. Dept. of Labor* v. *A. B. Kirschbaum Co.*, 124 F.2d 567, deals with Title 29, Sec. 213, U.S.C.A., which section defines a

retail or service establishment, and the Court uses this language:

> "A 'service establishment' within provision in Fair Labor Standards Act of 1938, that sections of the act regarding wages and hours are not applicable to employees engaged in retail or service establishments, means an establishment which has ordinary characteristics of retail establishments except that services instead of goods are sold, and is an establishment the principal activity of which is to furnish service to the consuming public, and includes barber shops, beauty parlors, shoe shining parlors, clothes pressing clubs, laundries and automobile repair shops.
>
> "Typical 'retail establishments' within provision in Fair Labor Standards Act of 1938, that sections of the act regarding wages and hours are not applicable to employees engaged in retail establishment, are grocery stores, drug stores, hardware stores, and clothing shops."

In *Phillips et al.* v. *Graham Aviation Co.*, 157 F.2d 443, it is said by the Court:

> "Whether an employee is engaged in commerce or in production of goods for commerce so as to be within coverage of Fair Labor Standards Act depends upon the work of the particular employee and not upon the nature of employer's business.
>
> "Guards and watchmen whose work of guarding local airfield and personnel and property thereon was purely local were not 'engaged in commerce' so as to be within coverage of Fair Labor Standards Act * * *."

The opinion of this Court is as follows:

> "The appeal is from a judgment dismissing an action for recovery of overtime compensation, liquidated dam-

ages, and attorney's fees alleged to be due employees under the provisions of the Fair Labor Standards Act of 1938, 29 U.S.C.A. Secs. 201-219. The controlling issue is whether the employment of appellants was within the coverage of the Act."

Quoting further:

"(1) The Fair Labor Standards Act of 1938 affords coverage to those employees 'engaged in commerce or in the production of goods for commerce.' There is no issue as to the 'production of goods for commerce', and appellants must stand or fall on the issue of whether they are 'engaged in commerce.' It is unnecessary to discuss whether appellee's business of training student fliers for the government and operating a flying field for that purpose can be considered interstate commerce, for under the Fair Labor Standards Act and the many decisions it is clear that in cases such as this the work of the particular employee is decisive. 29 U.S.C.A. Secs. 206, 207; *McLeod* v. *Threlkeld*, 319 U.S. 491, 497, 63 S. Ct. 1248, 87 L. Ed. 1538, *affirming* 5 Cir., 131 F.2d 880; *Jax Beer Company* v. *Redfern*, 5 Cir., 124 F.2d 172. The work of these appellants was purely local in character; a mere guarding of the local airfield and the personnel and property thereon. On the facts of this case, a holding that such activity by appellants is 'interstate commerce' would be stretching coverage beyond the breaking point to include a situation far beyond the pale of the Act. *McLeod* v. *Threlkeld*, 5 Cir., 131 F.2d 880, 881. *Cf. Murphy* v. *George Aero-Tech*, D. C., 49 F. Supp 982, *Fleming* v. *Pearson Hardwood Flooring Co.*, D.C., 39 F. Supp. 300, *LeFevers* v. *General Export Iron & Metal Co.*, D.C., 36 F. Supp. 838.

"(2) Appellants were not 'engaged in commerce' within the coverage of the Act.

"In view of our decision on the merits of the case, we deem it unnecessary to discuss the cross-appeal.

"The judgment is affirmed."

The defendants feel that there is some confusion in this case with reference to the question of jurisdiction because of the fact that jurisdiction in this case depends upon whether or not the plaintiff Hill proved that he was engaged in interstate commerce. When he alleged in his petition that he was engaged in interstate commerce, it then of course became the duty of the court to hear the case and if the evidence supported the allegations of the petition the court had jurisdiction. This can only be determined by an examination of the evidence. Assume for the purpose of argument only that the plaintiff had filed the suit as he had filed it here and alleged that he was engaged in interstate commerce or in the production of goods for interstate commerce, this would have given the court jurisdiction to hear the evidence, but the petition without the evidence would not be sufficient to authorize the rendition of a judgment. Our contention simply is, on the question of jurisdition, that the court under the evidence presented did not have jurisdiction to render a judgment in favor of the plaintiff Hill because he failed under his testimony and under all the evidence to show that he was engaged in interstate commerce.

It will be noted from the evidence that he claimed he operated public scales, which is purely a local operation, as the authorities above show and the statute itself provides for. Could this Court say from the evidence that Leroy Hill, the plaintiff, was engaged in interstate commerce? If

the Court can, then the trial court had jurisdiction to render judgment. If the Court cannot, then the trial court did not have jurisdiction to render the judgment, because as pointed out in the authorities above, this is absolutely essential to authorize the rendition of a judgment or give the court jurisdiction to render a judgment. There must be more than a showing that a party was engaged to some degree in interstate commerce, although this plaintiff was engaged in no degree. As said in the authorities above, UNLESS A SUBSTANTIAL PORTION OF THE EMPLOYEE'S ACTIVITIES IS IN INTERSTATE COMMERCE HE DOES NOT COME WITHIN THE PROTECTION OF THE FAIR LABOR STANDARDS ACT, and as said in the authorities cited above, THE APPLICATION OF THE FAIR LABOR STANDARDS ACT DEPENDS ON THE CHARACTER OF EMPLOYEE'S ACTIVITIES AND SOME EMPLOYEES MAY BE ENGAGED IN COMMERCE WHILE OTHERS DOING DIFFERENT WORK FOR THE SAME EMPLOYER ARE NOT. The plaintiff Hill claims that he operated the scales, public scales. This clearly is not interstate commerce. It is merely a local service as said in the cases cited hereinabove. Then he said that he guarded some vending machines. This does not bring him within the provisions of the Act. In *Bogosh v. Baltimore Cigarette Service*, decided in 100 F. Supp. 250, and affirmed by the Circuit Court of Appeals in 193 F.2d 291, the Circuit Court of Appeals said:

> "Where company purchased automatic vending machines, cigarettes and matches either through out of state company of which it was a subsidiary or directly from manufacturers, installed machines in various

> public places within state under agreement whereby company retained ownership of machines and entire control over their maintenance, and all money obtained through machines belonged to it, with owners of premises being paid at agreed rates, based upon amount taken in through machines, company was a 'retail establishment' within provisions of this section, whose employees were expressly exempted from operation of the minimum wage and maximum hour provisions of section 201 *et seq.* of this title."

It will be noted in that case that the Circuit Court of Appeals stated specifically that this type of employment was expressly exempted from the operation of the law. Then the only two things that the plaintiff did was operate public scales, which we have shown were exempted because it was a local service, specifically exempted from the Act, and he claimed to guard some vending machines, which are likewise specifically exempted from the Act.

Jurisdiction Lacking

The word "jurisdiction" is derived from the Latin "juris" and "dico," and means "I speak by the law." This phrase is used in *Johnson* v. *Harvey*, 88 S.W.2d 42, and *Atwood* v. *Cox*, 55 P.2d 377, and may also be found in 35 C.J., page 426, note 11. This we think brings out the point we urge here: that the trial court did not speak by the law because the law only would give relief to the plaintiff if he were engaged in interstate commerce, and we think the trial court mistook the word "jurisdiction" or misconstrued it because he thought that merely by alleging that the plaintiff Hill was engaged in commerce this would give the

court jurisdiction. This would give and did give the court jurisdiction to hear the case, but not to render the judgment for the reason that it required evidence showing interstate commerce in order to give the court jurisdiction to render the judgment, and jurisdiction of a court in a particular case includes not alone the power to hear the case but the power to render the particular judgment entered.

The Appellate Court in California in the case of *King* v. *Superior Court in and for San Diego County, et al.*, 56 P.2d 268, used the following language:

> "* * * The rule in such cases may thus be stated: When jurisdiction to inquire and act depends upon the existence of certain facts, the absence of proof of such facts limits the power to that of inquiry only, and, if action is attempted, it is in excess of jurisdiction. The same reasoning is applied to cases before the Industrial Accident Commission. It is thus stated in *Re Lake*, 65 Cal. App. 420, 224 P. 126, 127:
>
> "'While neither writ is one of error, both extended to the entire record of the court below and to the evidence itself when necessary to determine jurisdiction. *Hotaling* v. *Superior Court* (191 Cal. 501, 217 P. 73, 75 (29 A.L.R. 127). This inquiry, of course, cannot go beyond the question of jurisdiction, and the review of the evidence is limited to the sole purpose of determining, first, whether jurisdiction existed; and, second, whether jurisdiction was exceeded. Thus, where the question is whether jurisdictional facts were or were not proved, the review extends, not only to the entire record, but to the evidence itself. *Stumpf* v. *Board of Supervisors*, 131 Cal. 364, 367, 63 P. 663, 82 Am.St.Rep. 350; *McClatchy* v. *Superior Court*, 119 Cal. 413, 419, 51 P. 696, 39 L.R.A. 691; *In re Estate of Paulsen*, 179 Cal. 528, 529, 530, 178 P. 143; *Great Western Power*

Co. v. *Pillsbury*, 170 Cal. 180, 185, 149 P. 35; *Van Hoosear* v. *Railroad Com.*, 189 Cal. 228, 207 P. 903, 907; *Hotaling* v. *Superior Court* (191 Cal. 501) 217 P. 73, 75 (29 A.L.R. 127). In *Van Hoosear* v. *Railroad Com.*, *supra*, the Supreme Court, on this point, says [189 Cal. (228) 236, 207 P. (903) 906]: "That under a writ of review, the evidence of facts upon which the lower court or tribunal depended for its jurisdiction may be considered, and its judgment set aside if jurisdiction is without support in the evidence, is beyond dispute." In the same case [189 Cal. (228) 236, 207 P. (903) 907] the court quoted with approval the following passage from *McClatchy* v. *Superior Court*, *supra*: "While the writ of certiorari is not a writ of error, 'it is nevertheless', as suggested in *Schwarz* v. *Superior Court*, 111 Cal. (106) 112, 43 P. 580, 'a means by which the power of the court in the premises can be inquired into; and for this purpose the review extends not only to the whole of the record of the court below, but even to the evidence itself, when necessary to determine the jurisdictional fact.' If, then, by looking at the evidence we can see that the court exceeded its power, we have a right to examine the evidence for that purpose.' "

It was the duty of the Supreme Court of Oklahoma to determine the question of jurisdiction of its own motion, but this it refused to do.

The plaintiffs in error in the Supreme Court of Oklahoma, petitioners here, defendants in the trial court, presented the appeal to the Supreme Court of Oklahoma on one of the grounds that the trial court did not have jurisdiction to render the judgment, that the evidence must show that the party seeking to come under the Wage and Hour Law or the Fair Labor Standards Act of 1938 must

prove by evidence that he was engaged in the production of goods for commerce or engaged in interstate commerce. The Supreme Court brushed aside this contention on the ground stated previously in this petition; that it could not review the evidence.

We now call to this Court's attention the former Oklahoma cases with reference to the duty of the court to look into the jurisdictional questions even on its own motion.

We now cite the following cases in support of that principle of law:

Rorem v. *Bodine*, 178 Okla. 235, 62 P.2d 630:

> "'It is the duty of the court to determine the question of its jurisdiction of its own motion, and it will not ignore a want of jurisdiction because the question is not raised or discussed by either party.' *Jones & Spicer* v. *Advance-Rumley Co.*, 157 Okla. 67, 10 P.(2d) 724."

In the case of *Stuckey* v. *City of Tulsa*, 113 Okla. 45, 238 Pac. 837, this Court said in part as follows:

> "The question of jurisdiction is primary and fundamental in every case, and may be raised at any time before final disposition of the cause."

In *Sanders* v. *Oklahoma Employment Sec. Commission*, 200 Okla. 266, 195 P.2d 272, this Court said in part:

> "Question of jurisdiction of court over subject matter of action can be raised by motion to dismiss for want of jurisdiction at any stage of proceeding, and

even in absence of such motion court should inquire into its own jurisdiction.

"'Jurisdiction of subject matter' is power of courts to take cognizance of and hear and determine subject matter in controversy between parties."

McNee v. *Hart*, 117 Okla. 220, 246 Pac. 373:

"The question of jurisdiction is primary and fundamental in every case, and cannot be waived by the parties or overlooked by the court. It is the bounden duty of the court to examine into its jurisdiction, whether raised by any party or not, and '*sua sponte*' to determine its own jurisdiction."

In *Mathers & Mathers* v. *Urschel*, 74 F.2d 591, the Circuit Court of Appeals, Tenth Circuit said in part:

"In suit to secure possession of automobile held by district attorney and federal agents, question of lack of jurisdiction of District Court could be raised on appeal, since question went to subject-matter."

State ex rel. State Highway Commission v. *Asendorf*, 203 Okla. 263, 220 P.2d 272:

"The question of jurisdiction is primary and fundamental in every case, and cannot be waived by the parties or overlooked by the court. It is the duty of the court to examine into its jurisdiction, whether raised by any party or not, and *sua sponte* to determine its own jurisdiction."

In *Edwards* v. *Twine*, 203 Okla. 646, 225 P.2d 359, this Court said in part:

"Jurisdiction of subject matter cannot be conferred by waiver."

Durham v. *Sharum*, 203 Okla. 426, 222 P.2d 1029:

"Question of jurisdiction may be raised at any time by parties, or by the court on its own motion."

There Is No Justification for Liquidated Damages Herein

Apparently the trial court did not consider that it had any discretion and did not exercise any discretion in determining the question of liquidated damages. Liquidated damages are allowed under the Act. Formerly when this Law was passed it was mandatory that liquidated damages be allowed, but in 1947 Congress decided that there were many cases where liquidated damages should not be allowed and this should be left to the discretion of the trial court. Congress decided it was too harsh to penalize a person in an amount equal to the amount of the judgment, or in many cases in any amount whatsoever, and on May 14, 1947, Congress passed Section 260 of Title 29, U.S.C.A., which is in words and figures as follows:

"In any action commenced prior to or on or after May 14, 1947, to recover unpaid minimum wages, unpaid overtime compensation, or liquidated damages, under the Fair Labor Standards Act of 1938, as amended, if the employer shows to the satisfaction of the court that the act or omission giving rise to such action was in good faith and that he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act of 1938, as amended, the court may, in its sound discretion, award no liquidated damages or award any amount thereof not to exceed the amount specified in section 216(b) of this title."

The trial court in this case of *Hill* v. *Friedman* rendered judgment for $2,188.50 as liquidated damages. That was the limit or top amount he could render under any condition and equal to the amount recovered as wages for overtime compensation, plus $656.00 attorneys' fees. As to this $2,188.50 liquidated damages, the court did not pass upon the question of good faith or bad faith of the defendants, but simply rendered a judgment for that amount. We think under any condition and in any view of this case it should be reversed at least as to the liquidated damages with instructions to the trial court to determine whether liquidated damages should be granted, and if so in what amount. If the employer shows to the satisfaction of the court that his act or omission was in good faith or he had reasonable ground for believing that his act or omission was not a violation of the Fair Labor Standards Act, then the court should not award liquidated damages. The federal courts have held that good faith was shown in the following cases: *General Elec. Co.* v. *Porter*, 208 F.2d 805; *Michigan Window Cleaning Co.* v. *Martino*, 173 F.2d 466; *Neal* v. *Braughton*, 111 F. Supp. 775; and in the case of *Fred Wolferman, Inc.* v. *Gustafson*, 169 F.2d 759, the Circuit Court of Appeals reversed that case with directions to the trial court to determine whether or not the defendants were in good faith and to deny liquidated damages if the trial court felt so justified after considering said matter. In *Van Dyke* v. *Bluefield Gas Co.*, 210 F.2d 620, the Court refused to fix liquidated damages because the defendants were advised by an attorney that the employee was not covered by the Act, and in the *General Elec. Co.* v. *Porter* case, heretofore cited, it was found that the advice of the lawyer was

wrong, yet the defendants believed it and the Court said that the defendant should not be penalized by liquidated damages. In the case of *Ispass et al. v. Pyramid Motor Freight Corporation*, 78 F. Supp. 475, the Court discusses the two conditions under which no liquidated damages should be awarded and we quote from that case as follows:

> "Section 11 specifies two conditions under which the Court may, in its discretion, award no liquidated damages, or may award any amount thereof.
>
> "The employer must show to the satisfaction of the Court that (1) his act or omission was in good faith, and (2) he had reasonable grounds for believing that his act or omission was not a violation of the Fair Labor Standards Act."

Quoting from the body of the opinion the Court said:

> "I believe all of these circumstances clearly show that the defendant had reasonable grounds for believing that it was not violating the Act. The uncertain condition of the problem rendered highly difficult a correct course of action during the periods in suit. In fact, the question is still in controversy, as the recent decisions of the Supreme Court manifest.
>
> "Further, all the circumstances convince me that the defendant's omissions were in good faith, and that its actions were completely consistent with such conviction.
>
> "I award, therefore, in my discretion, no liquidated damages to plaintiffs."

Petitioners Denied Due Process of Law

The judgment of the District Court of Oklahoma County and the opinion of the Supreme Court of the State of Oklahoma denies to the petitioners herein their Constitutional rights and is violative of Amendment V of the Constitution of the United States in that it denies to them due process of law.

> "The term 'due process of law' is not susceptible of exact or comprehensive definition. Its meaning has been developed in the cases by a process of judicial inclusion and exclusion."

This quotation above given will be found in *Gilbert* v. *Elder*, 65 Idaho 383, 144 P.2d 194, 196. The Supreme Court of the United States used this language in substance, that "due process of law" has never been a term of fixed and invariable content. See: *Federal Communications Commission* v. *WJR, The Goodwill Station*, 69 Sup. Ct. 1097, 337 U.S. 265, 93 L. Ed. 1353. Also 12 C.J., p. 1188, note 54.

It appears that the Supreme Court of the United States has consistently refused to attempt a comprehensive definition of what is meant by due process of law. See *Douglas* v. *City of Jeannette*, C.C.A. Pa., 130, F.2d 652, which case was affirmed in 63 Sup. Ct. 877, 319 U.S. 157, 87 L. Ed. 1324. It has been said that, as is universally conceded, due process of law is not susceptible, or does not admit, of exact, precise, or comprehensive definition, its meaning necessarily varying with the dissimilarity in the proceedings in which it is required; that it is too broad a term to admit of a short

definition which will cover every situation. Supporting this statement above, we call now to the Court's attention a few of the cases so holding. In a Wyoming case that Court in *Pirie* v. *Kamps*, 68 Wyo. 83, 229 P.2d 927, 929, 26 A.L.R.2d 647, used this language:

> "* * * the concept is indefinable by legalistic formula."

In the case of *People, on Complaint of McDonald* v. *Simonian*, 18 N.Y.S.2d 371, the New York Court said:

> "It is difficult to define with precision the exact meaning and scope of the phrase 'due process of law'."

Also in the case of *In re Security Trust Co. of Rochester*, 70 N.Y.S.2d 260, and 92 N.Y.S.2d 308, 97 N.Y.S.2d 922, that Court said:

> "Any definition of 'due process of law' would probably fail to comprehend all the cases to which it would apply."

The Indiana Court in *Warren* v. *Indiana Telephone Co.*, 26 N.E.2d 399, 409, said:

> "The constitutional guaranty of due process is one of broad and comprehensive implications, not readily definable with precision."

12 C.J., p. 1188, note 55, says:

> "As applied to different classes of cases, courts, by process of inclusion or exclusion, apply the principles involved in the phrase."

The Court also said:

"From the duty of the citizen to obey the laws of the state arises the corresponding right of the citizen to insist that the state comply with its own laws, and to demand, in the language of the constitution of the state that he be not deprived of his life, libery, or his property unless by the judgment of his peers or the law of the land."

See the case of *U. S. ex rel Valotta* v. *Ashe*, D.C. Pa., 2 F.2d 735, 743, reversed on other grounds, 46 Sup. Ct. 333, 270 U.S. 424, 70 L. Ed. 662.

"This provision of our organic law guarantees that every one shall have his life, liberty, property, and immunities protected by the general rules characteristic of, basic to and existing in our society under our system of jurisprudence."

See *State ex rel Sweezer* v. *Green*, 360 Mo. 1249, 232 S.W.2d 897, 903, 24 A.L.R.2d 340.

In *U. S. ex rel Montgomery* v. *Ragen*, D.C. Ill., 86 F. Supp. 382, this language is used:

"Fair play is the essence of due process."

See *Galvan* v. *Press*, Cal., 74 Sup. Ct. 737, 742, 347 U.S. 522, 98 L. Ed. 911.

"The concept of due process stems from our American ideal of fairness."

See *Bolling* v. *Sharpe*, App. D.C., 74 Sup. Ct. 693, 694, 347 U.S. 497, 98 L. Ed. 884.

JUDGE COOLEY defined due process and that definition is set forth in *Dukich* v. *Blair*, D.C. Wash., 3 F.2d 302. The Supreme Court of Oklahoma defined it in *Wilhite* v. *Cruce*,

70 Okla. 70, 172 Pac. 962. Another definition which is interesting is the one found in *U. S. ex rel Montgomery* v. *Ragen,* cited *supra*, where due process is defined as follows:

> "Due process of law is that process of impartial law which is binding because it is right. It senses the mistakes of the past and wants to rectify them. It provides men with faith."

CONCLUSION

From the opinion of the Supreme Court itself refusing to consider the evidence and from the record herein, the petitioners think there is no question but that they were denied a fair trial, that the judgment rendered is void and that the opinion of the Supreme Court of Oklahoma denied these petitioners due process of law, and that the construction placed upon the Federal Act, namely the Fair Labor Standards Act of 1938 and the Amendments thereto, is violative of the construction placed on said Act by the Supreme Court of the United States and the various Federal Courts, and that this Court should grant the petition herein, review this cause and reverse the same.

The fact that the plaintiff in the trial court, respondent here, Leroy Hill, had been convicted of felonies in the Courts of Texas and Oklahoma so many times, namely 18 times, and had put in most of his adult life in the penal institutions of Oklahoma and Texas and was at the time of trial out on parol from the State Insane Asylum at Norman, Oklahoma, were presented with other grounds in a motion for new trial for and on account of newly discovered evidence as the petitioners did not know all these facts

when the trial was being had, but the Supreme Court of Oklahoma denied this contention and we presume that since that was a matter of state procedure that the opinion of the Supreme Court of Oklahoma would be binding thereon, but the opinions of the Federal Courts are binding on the opinions of the state courts in construing Federal Statutes, and we wish to call to this Court's attention that the opinion of the Supreme Court complained of in this case was not a unanimous opinion but two of the nine justices dissented.

WHEREFORE, petitioners most respectfully petition and pray this Honorable Court to grant the Writ, review this case and reverse the same.

Most respectfully submitted,

JOHN B. OGDEN,
1408-9 Liberty Bank Building,
Oklahoma City, Oklahoma,
Attorney for Petitioners.

July, 1958.

CERTIFICATE

I, John B. Ogden, attorney for the petitioner, certify that the Petition for a Writ of Certiorari is filed and presented in good faith and not for the purpose of delay, but in order that substantial justice may be done.

Dated this the 11 day of July, 1958.

JOHN B. OGDEN

CERTIFICATE OF MAILING

I certify that I mailed a true and correct copy of this Petition for a Writ of Certiorari to Roger Swan, attorney for respondent, Braniff Building, Oklahoma City, Oklahoma, on this the 11 day of July, 1958, by depositing the same in the United States Mail with sufficient postage affixed thereon.

JOHN B. OGDEN

APPENDIX

APPENDIX A

IN THE SEVENTH DISTRICT COURT JUDICIAL DISTRICT, IN AND FOR OKLAHOMA COUNTY, STATE OF OKLAHOMA.

Leroy Hill,

Plaintiff,

vs. No. 136,379

Barney Friedman and Sarah Friedman, husband and wife dba City Metal Salvage Co.

Defendants.

JOURNAL ENTRY OF JUDGMENT

On this 14th day of February, 1956, came plaintiff in person and by his attorney, Roger H. Swan, and also came the defendants in their own proper persons and by their attorney, Sidney Massie, and this cause came on for trial in its regular order before the court and a jury of twelve good men, who being duly empaneled and sworn, well and truly do try the issues joined between plaintiff and defendants and true answers render according to the evidence, to three questions submitted to said jury as stipulated and agreed by and between the parties, as Interrogatory 1, Interrogatory 2, and Interrogatory 3; and having heard the evidence, the charges of the court and the argument of counsel upon their oaths say: Interrogatory No. 1 QUESTION. How many weeks did the plaintiff work for the defendants? WE THE JURY, empaneled and sworn in the above en-

titled cause, do upon our oaths, in response to the question hereinabove propounded, give our answer thereto as follows: ANSWER: 25 weeks. Interrogatory No. 2. QUESTION: How many hours did the plaintiff work each week for defendants? WE THE JURY, empaneled and sworn in the above entitled cause do upon our oaths, in response to the question hereinabove propounded, give our answer thereto, as follows: ANSWER: 107½. Interrogatory No. 3. QUESTION: How many hours, the total number, did the plaintiff work for defendants? WE THE JURY, empaneled and sworn in the above entitled cause, do upon our oaths, in response to the question hereinabove propounded, give our answer thereto, as follows: ANSWER: 2687½.

Whereupon, the court, having received the answers of the jury to the interrogatories and having considered all the evidence, the argument of counsel, and being fully advised in the premises, on consideration finds that the plaintiff has sustained the allegations of his petition and is entitled to judgment accordingly.

It is therefore considered ordered adjudged and decreed by the court that the said plaintiff, Leroy Hill, have and recover of the said defendants, Barney Friedman and Sarah Friedman, husband and wife, doing business as City Metal Salvage Company, the sum of $2,188.50 as unpaid minimum wages and unpaid overtime compensation for the period from November 7, 1954 to May 2, 1955, and the said plaintiff shall have and recover of said defendants an additional equal amount of $2,188.50 as liquidated damages; together with an amount of $656.00, as a reasonable attorney's fee, for a total recovery by said plaintiff of said defendants of $5,033.00 with interest thereon at 6 per cent per annum from this date, and for costs of this action, for all of which let execution issue; to which finding and judg-

ment the defendants then and there duly excepted, and exceptions allowed.

/S/ Clarence Mills
JUDGE OF THE DISTRICT COURT
(Written in ink) O.K. Dale Smith

/S/ Roger H. Swan
OK. ROGER H. SWAN
ATTORNEY FOR PLAINTIFF

/S/ Sidney M. Massie
OK. SIDNEY MASSIE
ATTORNEY FOR DEFENDANT

ENDORSED:

No. 136,379

JOURNAL ENTRY OF JUDGMENT

FILED IN DISTRICT COURT
Oklahoma County, Okla.

FEB 15 1956

DALE SMITH, Court Clerk
By /S/ E. C. Brett
Deputy

RECORDED:
Book 563
Page 443

APPENDIX B

Filed in Supreme Court of Oklahoma

JAN 21 1958

Andy Payne, Clerk

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

Barney Friedman and Sarah Friedman, husband and wife, d/b/a City Metal Salvage Company,	)	
Plaintiffs in Error,	)	
vs.	)	No. 37487.
Leroy Hill,	)	
Defendant in Error	)	

SYLLABUS

1. To obtain consideration by the Supreme Court of the question of the sufficiency of the evidence as a whole for submission to the jury, a defendant must raise said question after the evidence has been introduced. It is not raised and preserved for review where defendant demurs to plaintiff's evidence and, after said demurrer is overruled, introduces evidence in his own behalf and makes no objection to the sufficiency of the evidence as a whole until the filing of his motion for a new trial.

2. Where a new trial is sought on the ground of newly discovered evidence, an affidavit stating the material facts constituting the exercise of reasonable diligence to discover and produce such evidence at the trial is required. The requirement is not satisfied by an al-

legation that reasonable diligence was used, as that is merely a conclusion. Unless this court can say from the evidence contained in the record that the trial judge should have concluded as a matter of law that the party seeking a new trial exercised reasonable diligence, we cannot hold that the trial court abused its discretion in denying the motion.

APPEAL FROM THE DISTRICT COURT OF OKLAHOMA COUNTY

HON. CLARENCE MILLS, JUDGE

AN ACTION FOR UNPAID WAGES AND LIQUIDATED DAMAGES UNDER THE PROVISIONS OF THE FEDERAL WAGE AND HOUR ACT. JUDGMENT FOR THE PLAINTIFF. DEFENDANTS APPEAL.

AFFIRMED

John B. Ogden,
Oklahoma City — For Plaintiffs in Error,

Robert H. Swan,
Oklahoma City, — For Defendant in Error.

PER CURIAM:

This action was initiated by the plaintiff, defendant in error, to recover from the defendants, plaintiffs in error, the amount of unpaid wages and overtime as determined by the provisions of the Federal Fair Labor Standards Act of 1938, sec. 16(b), 52 Stat. 1060, 29 U.S.C.A., Sec. 216(b). We shall continue to refer to the parties by their trial court status.

The petition alleged that the plaintiff was employed by the defendants as a "weigher of Motor Freight Carriers" and night watchmen, a job covered by the provisions of the Act, and that he had not received payment in the amount specified by the minimum wage scale established

by said Act. Judgment was asked for the deficiency between the amount paid plaintiff and the amount due under the provisions of the Act for the number of hours worked by him, with liquidated damages and attorney fees as provided therein. The action was tried to a jury whose conclusion, expressed by its answers to interrogatories, favored plaintiff and judgment was rendered for him. Defendants appeal.

The first three propositions presented by the defendants concern the sufficiency of the evidence to sustain a judgment for plaintiff. However, the sufficiency of the evidence to sustain the judgment is not open to examination by this court. At the conclusion of the plaintiff's evidence in chief the defendants demurred and this demurrer was overruled by the court. Thereafter, the defendants proceeded to introduce evidence in their own behalf and at the conclusion of all the evidence they did not renew the previous demurrer or move the court to direct a verdict in their favor. Thus the sufficiency of the evidence to sustain the judgment has not been presented for review. *L. E. Richardson, d/b/a Richardson Service Station* v. *Silas Shaw*, (Okla.), 313 P.2d 520 and *Richardson* v. *Butler*, 206 Okla. 79, 240 P.2d 1058; *Wright* v. *Linder*, 196 Okla. 493, 166 P.2d 104.

The remainder of the propositions presented for review concern the action of the trial court in denying the defendant's motions for a new trial on the grounds of newly discovered evidence. The defendant's first motion for a new trial alleged newly discovered evidence and contained the affidavits of the defendants with supporting affidavits of persons who it is stated would testify to the facts alleged to be newly discovered. The defendants' affidavits stated that they first discovered this "new evidence" by "talking about the case and *it's result* to various people who came into their place of business, and who in turn advised the said defendants of what their testimony could and

would be at a new trial." They further alleged in their affidavit:

> "That prior to said trial they made diligent search to locate witnesses to prove said facts by going to certain places they believed this plaintiff might have spent time, and people with whom he might have spent time, but despite this reasonable diligence extended, they were unable to secure such witnesses."

The supporting affidavits disclose that such of the alleged "new evidence" is merely cumulative, corroborative or impeaching in relation to evidence offered at the trial concerning the number of hours plaintiff worked. The affidavit of one witness does contain allegations of fact concerning employment of plaintiff at another job during the period for which he claimed compensation from defendants, but as to this witness we note that his employer testified on behalf of the defendants and that his place of employment was in close proximity to and on the same street as that of the defendants. No testimony other than the affidavits was offered in support of the motion for a new trial. To justify the court in granting a new trial on the grounds of newly discovered evidence, the facts constituting diligence must be shown so that the court may determine whether the diligence used was sufficient. It is not sufficient for the party to allege due diligence; he should allege and prove facts evidencing such diligence. The burden is upon the moving party to show that he used reasonable diligence. As we pointed out in *Berry* v. *Park*, 188 Okla. 477, 110 P.2d 902:

> "* * * Unless we can say that from the evidence as contained in the record the trial judge should have believed reasonable diligence was used, and should have so concluded as a matter of law, we cannot hold that he was guilty of a faulty fact finding or abuse of discretion * * *."

In that regard it was pointed out in *Odeneal* v. *Halley*, 207 Okla. 642, 251 P.2d 1048:

> "The failure to make inquiry of persons likely to know the facts constituting alleged 'newly discovered evidence', such persons being reasonably available upon ordinary inquiry, and there being no hindrance to such inquiry, is failure to exercise reasonable diligence to discover such evidence as might have been established by said persons as witnesses."

We do not believe that a sufficient showing of diligence has been made in this case.

The defendants likewise filed a supplemental and a second supplemental motion for new trial upon the grounds of newly discovered evidence. In the supplemental motion the allegation was "that they made effort and with due diligence were unable to obtain said information before trial", which is a mere conclusion and insufficient to support the granting of a new trial. In addition the evidence offered as newly discovered was collateral to the issues and directed solely to the credibility of the plaintiff as a witness. The second supplemental motion was directed to the capacity of the plaintiff to sue by reason of an adjudication of insanity. Diligence in this regard was likewise not shown and, in any event, the failure to raise the plaintiff's lack of capacity to sue by an appropriate pleading waives that question.

Judgment is affirmed.

The defendant in error has requested the allowance of an additional attorney's fee. Under all the circumstances of this case, and in view of the fee allowed by the trial court, we do not believe that the allowance of an additional fee would be justified.

The defendant in error has also requested this court to render judgment on the Appeal Bond filed herein. In ac-

cordance with that request, judgment is here rendered against Barney and Sarah Friedman, Principals, and Sam Skalovsky and I. H. Gardner, Sureties, on said bond in the amount of $5,033.00 with interest at 6% from February 14, 1955, and the cost of this action, judgment here to be enforced by the trial court as if there rendered.

The Court acknowledges the aid of the Supreme Court Commission in the preparation of this opinion. After a tentative opinion was written by the Commission, the cause was assigned to a Justice of this Court. Thereafter, upon report and consideration in conference, the foregoing opinion was adopted by the Court.

CORN, V.C.J, and DAVISON, HALLEY, JOHNSON, WILLIAMS, BLACKBIRD, JACKSON AND CARLILE, JJ., Concur.

Filed in Supreme Court of Oklahoma

May 20 1958

Andy Payne, Clerk

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

Barney Friedman, et al.	)	
	)	
Plaintiffs in Error,	)	
	)	
v.	)	No. 37,487.
	)	
Leroy Hill,	)	
	)	
Defendant in Error	)	

ORDER

It is hereby ordered that the vote shown on the opinion filed in the above styled and numbered case on January 21, 1958, be and it is changed to read, as follows:

Corn, V.C.J and Davison, Halley, Johnson, Blackbird, Jackson and Carlile, JJ. CONCUR
Welch, C.J. and Williams, J. DISSENT

DONE BY ORDER OF COURT IN CONFERENCE this 19th day of May, 1958.

/S/ Earl Welch
CHIEF JUSTICE

Filed in Supreme Court of Oklahoma

JUN 17, 1958

Andy Payne, Clerk

IN THE SUPREME COURT OF THE STATE OF OKLAHOMA

Barney Friedman and Sarah Friedman, husband and wife, d/b/a City Metal Salvage Company,	)	
Plaintiffs in Error,	)	
vs.	)	No. 37,487.
Leroy Hill,	)	
Defendant in Error	)	

ORDER

This matter coming on to be heard on this 16th day of June, 1958, on a motion to recall mandate and the Court having considered the same it is hereby ordered and directed that the motion to recall the mandate is denied.

The enforcement of the mandate is by this order stayed for thirty days from this date pending the filing of a proceeding in the Supreme Court of the United States on appeal or by writ of certiorari and when this proceeding is

filed in the Supreme Court of the United States the enforcement of the mandate is stayed further until further order of this Court.

Done by order of Court in Conference this 16th day of June, 1958.

/S/ N. S. Corn
Acting Chief Justice.